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No. 524.

In the Supreme Court of the United States.

OCTOBER TERM, 1920.

THE UNITED STATES OF AMERICA,
PLAINTIFF IN ERROR,
v.
CORONADO BEACH COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

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IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This writ of error is brought by the United States to review the judgment of the District Court of the United States for the southern district of California, southern division, entered upon the verdict of a jury awarding defendant Coronado Beach Company the sum of $5,000,000 as the fair market value of the property known as North Island in the harbor of San Diego, California.

These proceedings were brought under authority of the Act of July 27, 1917, c. 42, 40 Stat. 247,[1]

[1] CHAP. 42. An act authorizing the President to take possession, on behalf of the United States, for use as sites for permanent aviation stations for the Army and Navy and for

which authorized the President to take possession forthwith for national defense and as sites for permanent aviation stations for the Army and Navy, of the whole of North Island in the harbor of San Diego, California, and the Attorney General or the claimants of North Island to make "application for the determination and appraisement of any rights private parties may have in the said island over and beyond any rights thereto in the United States to the District Court of the United States for the southern district of California." The Act further provided that proceedings be prosecuted in accordance with the laws of the State of California relating to the condemnation of property for public use, and for direct appeal to the Supreme Court of the United States within ninety days after the judgment was rendered, and for the distribution of the amount of

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aviation school purposes, of the whole of North Island in the harbor of San Diego, California, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the President be, and he is hereby, authorized to cause possession to be taken forthwith, on behalf of the United States, for use for national defense and in connection therewith as sites for permanent aviation stations for the Army and Navy and for aviation school purposes, of the whole of North Island, in the harbor of San Diego, California, and the provisions of section three hundred and fifty-five, Revised Statutes, shall not apply to the expenditure of any appropriations for improvements thereon for aviation purposes.

The Attorney General or the claimants to the said North Island are authorized to make application for the determination and appraisement of any rights private parties may have in the said island over and beyond any rights thereto in the United States to the District Court of the United States for

the award to private owners "as their respective interests may be determined by the court."

The bill of complaint was filed in equity (see R. 525), and alleged that the United States had an easement or interest in the land, asked that defendant Coronado Beach Company be required to set up its claim but that the same be adjudged to be subordinate to the rights and interests of the United States for purposes of national defense, and that the company be enjoined from claiming or asserting any right, title or interest in said land adverse to and in conflict with the rights of the United States. R. 1.

Upon the answer of defendant (see R. 525, p. 4, denying that the United States was the owner of

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the Southern District of California; the proceedings to be prosecuted in accordance with the laws of the State of California relating to the condemnation of property for public use. Either party may take an appeal from the judgment of such court direct to the Supreme Court of the United States within ninety days after such judgment is rendered. Upon the final ascertainment of the value of any right, title or interest adjudged to be in any private claimants to the said island there shall be paid into court the value of the same as so determined, together with interest thereon at the rate of six per centum per annum from date possession thereof was taken as herein authorized; and thereupon the United States shall be vested with title to said lands. The amount so paid shall be distributed by order of the court to the owner or owners of such right, title or interest in said island as their respective interests may be determined by the court. The amount necessary to pay the awards in favor of private claimants is hereby appropriated out of any money in the Treasury not otherwise specifically appropriated, to be disbursed under orders of the Secretary of War.

Approved, July 27, 1917.

any interest in the land described and asserting that the company was the sole owner thereof, and that its value was $7,500,000, the court entered a decree (see R. 525, p. 15) that defendant Coronado Beach Company was the sole and exclusive owner in fee simple absolute of all the lands described in the bill of complaint as the whole of North Island (R. 40), and thereupon the United States made application to transfer the case to the law side of the court for the purpose of determining and appraising the rights of defendant.

The case was submitted to a jury under the instructions of the court and the jury returned a verdict that the fair market value of the whole of North Island as of August 1, 1917, was $5,000,000. R. 106. The court also submitted to the jury special interrogatories: (1) as to the fair market value on August 1, 1917, of the land lying above high water mark, containing 1,232.93 acres more or less, referred to as mesa land, to which the jury returned a verdict that the market value of such land was $4,625,000; (2) as to the fair market value on August 1, 1917, of 207.24 acres of marsh land which the verdict of the jury valued at $45,000; and (3) as to the fair market value on August 1, 1917, of the lands lying below high water mark consisting of 663.3 acres, referred to as tide or submerged lands, which by the verdict of the jury were valued at $330,000.

During the trial plaintiff excepted to the ruling of the court on the admission of a certain map (Exhibit

D, R. 47),[1] and of evidence tending to establish the fair market value of the mesa or fast land (R. 48) and the lands lying below high water mark, as being together privately owned by defendant company; and also excepted to the instructions of the court to the effect that the ownership of defendant company extended out over the tide lands and submerged lands to the anchorage of ships, and that such private title to both mesa or fast lands and to the tide or submerged lands was derived from the Mexican government. R. 105.

Plaintiff requested the court to instruct the jury that the State of California is the owner of all land bordering on tidal waters within the state which is ordinarily below high water mark, and that private ownership of land bordering on tidal waters in that state can only extend to the ordinary high water mark, which requested instructions the court refused and plaintiff excepted thereto. R. 105.

The bill of exceptions (R. 24) embodies all of the evidence in the case (R. 24 to 99), and the exceptions saved at the trial; instructions to the jury (R. 100); exceptions to the instruction of the court (R. 104); verdict of the jury and answers to special interrogatories directed by the court (R. 106), and specifications of error of law occurring at the trial. R. 107–109.

[1] This exhibit is erroneously referred to in the assignment of errors as Exhibit C.

ASSIGNMENT OF ERRORS.

(R. 111.)

1. Error in denying a motion for a new trial because the verdict is against the law.

2. Error in denying a motion for a new trial because the evidence is insufficient to justify the verdict.

3. Error in denying a motion for a new trial because the verdict is against the weight of the evidence.

4. Error in refusing to instruct the jury that the State of California is the owner of all land bordering upon tide water within the State below ordinary high water mark, and that the private ownership of land bordering on tidal water therein can only extend to the ordinary high water mark.

5. Error in instructing the jury to the effect that the whole of North Island, as described in the Act of Congress, included not only the upland but the tide lands, that the ownership of defendant company does not stop at the line of ordinary high tide but extends out to the anchorage for ships, comprising 663 acres of tide lands in which defendant company had all the rights of full ownership, and that title to these tide lands was derived by defendant company from the Mexican government and is conclusively established and defined as against the United States by survey and patent.

6. Error in admitting in evidence the map offered by defendant company, filed as Exhibit C, for the reason that the map showed speculative uses of the property under circumstances which did not

exist and which might never exist, and included submerged and other lands adjacent to North Island, forming no part thereof, upon which were to be constructed wharves, warehouses, docks, piers and basins, and of 207.24 acres of marsh land lying above ordinary high water mark.

Under these assignments plaintiff in error submits the following propositions:

1. The defendant Coronado Beach Company does not privately own by grant from Mexico the tide lands fronting the upland of North Island, but these tide lands belong to the State of California as a part of its sovereignty.

2. At most, defendant company's right, title or interest, if any, in the lands below high water mark are subject to the paramount servitudes and powers of the federal and state governments to protect navigation, commerce, and fishery.

3. In any event, Congress did not authorize by the Act of July 27, 1917, condemnation of the tide lands.

4. Because the United States was entitled to have the 1232.92 acres of land lying above high water mark valued under proper instructions as to the title to, and character of ownership of, lands under navigable waters fronting thereon, the case should be reversed and remanded.

ARGUMENT.

I.

The defendant Coronado Beach Company does not privately own by grant from Mexico the tide lands fronting the upland of North Island, but these tide lands belong to the State of California as a part of its sovereignty.

1. *Defendant does not privately own lands below ordinary high water mark.*

By reference to the maps filed as exhibits with these proceedings it will be observed that the lands below high water mark are tide lands between ordinary high water mark and low water mark, and submerged lands between ordinary low water mark and the line which is termed anchorage for ships. These submerged lands are apparently covered by water in some places fifteen feet deep, but in this brief the terms "tide lands" and "submerged lands" will be used indiscriminately to denote lands below ordinary high water mark.

Defendant deraigned title by grant from Mexico to one Carrillo, a native of California, who on April 21, 1846 (R. 25), "being in want of a proper land for the breeding of cattle, both large and small, and horses, and desirous of encouraging these (kinds of) property, he names a vacant land in the limits of this port, on the southern part, known by the name of 'La Isla,' or peninsula, which the port of San Diego forms: The which contains a little more or less, two leagues or 'siteos,' according to the map which he transmits, said land being fit for a

cattle farm, for which purpose he asks for it, and is bounded on the north by the 'Estero' Creek of same port, east by the place of Don Aguitino Meliso, south by the sea, and west by the bay and ship anchorage."

The Governor of the Territory of California, Pio Pico, entered an order (R. 26) directing title to be issued to Carrillo, which declared him "owner in fee of the land known or named 'Isla,' or peninsula, in the port of San Diego towards the part of ——— of the anchorage." Patent was issued by the Governor May 15, 1846 (R. 27), containing the following conditions and description:

> 1. He may enclose it without prejudice to the crossings, roads, and servitudes, and enjoy it freely and exclusively, making such use or cultivation of it as may best suit him.
>
> 2. He shall request the proper magistrate to give him juridical possession in virtue of this order, by whom the boundaries will be marked out.
>
> 3. The land of which donation is made is two square leagues, and is bounded on the north by the estero of the port of San Diego towards the town, east by the end of the rancho of San Augustin Melisse, south by the sea, and west by the bay or anchorage for ships, as explained by the map which goes with the espediente. The magistrate who may give the possession will cause it to be measured in conformity with the ordinance.

On April 20, 1852, Billings and others (R. 28) petitioned the Commissioners to Settle Private Land

Claims in California, appointed under the Act of March 3, 1851, c. 41, 9 Stat. 631, for confirmation to them as successors in title to Carrillo of the title to—

> the island or peninsula of San Diego, situate in the present county of San Diego, containing two square leagues, with the boundaries described in the grant, a copy of which is submitted herewith marked A with a translation marked B.
>
> * * * * *
>
> And the petitioners further show that the said land has not been surveyed by the Surveyor General of the United States, such survey, from the nature of the case being unnecessary, the boundaries being natural, and not to be mistaken.

The Land Commissioners rejected the claim (R. 32) and upon appeal to the United States District Court for the southern district of California, the decision of the Commissioners was reversed (R. 33), the court decreeing—

> that the title of the appellants, Frederick Billings and others, to the lands claimed by them, as set forth and described in their petition to the said board of commissioners and the documentary and other evidence in this case, is a good and valid title, and that their claim to the said land be, and the same is hereby, confirmed.
>
> The land of which confirmation is hereby made is in quantity two square leagues and no more, is known by the name of the "Island

> or peninsula of San Diego," is situated in the county of San Diego, and is bounded on the north by the estero of the port of San Diego toward the town, east by the end of the ranch of Augustin Melijo, south by the sea, and west by the anchorage for ships, according to the documents of title and map to which reference is had.

From this decree the United States appealed to the Supreme Court, but on motion of the Attorney General the appeal was dismissed at the December term, 1863. R. 10 (R. 525, p. 37).

The survey of the land made by the United States Surveyor General for California in 1867 was approved June 11, 1869, and patent in accordance therewith that day issued. R. 36–38. The surveyor in running the line of this survey extended the western boundary beyond the ordinary high-water mark and to embrace 663 acres of submerged lands and tide lands below ordinary high-water mark.

2. *Rule of Spanish and Mexican law as to the sea and its shores.*

The sea and its shores are treated by these laws as being *bienes communes* incapable of private ownership.

> Moreau & Carleton's Partidas (ed. 1820), vol. 1, tit. 28, pp. 334–7.
>
> White's New Recopilacion (ed. 1839), vol. 1, p. 46; vol. 1, Book 2, p. 70.
>
> Hall's Mexican Laws (ed. 1885), c. IV, §§ 1463–1471, pp. 446–9.
>
> § 1465. * * * every man may enjoy the use of the sea and its shores, either for the

purpose of fishing or navigation, or doing there whatever else he may conceive advantageous to him. * * *

§ 1466. * * * And by the sea shore is understood all that space of ground covered by the waters of the sea in their highest annual swells, whether in winter or summer.

§ 1468. Rivers, ports and public roads belong to all men in common.

The rule of the civil law that lands covered by the tides at their highest flood during the year has not, however, been applied to that portion of the country ceded to the United States by Mexico, the rule being that to constitute such lands tide lands there must be such regularity of flow over them every twenty-four hours as to render them unfit for the uses to which the upland is applied, *San Francisco* v. *Le Roy*, 138 U. S. 671, concurring opinion, *Knight* v. *Land Ass'n*, 142 U. S. 161, 214.

While it may be that the crown or the congress of Mexico could for the common benefit limit the general rule of the civil law and grant the sea shore for appropriate purposes, *Jover* v. *Insular Government*, 221 U. S. 623, 629, the grant under which defendant company claims in this case, as we have seen, was under the law of August 18, 1824, for the colonization of territories of the republic. Hall's Mexican Laws, p. 147, and the General Rules and Regulations for the colonization of territories of November 21, 1828, Jb., p. 149.

For convenience copies of this law and these rules and regulations are printed as an appendix to this brief.

Under this law there is no presumption of any power in the territorial governor of California to make a grant of the lands below ordinary high water mark. Authority to make these grants and the terms and conditions thereof are prescribed by these laws, and the court must look to them both for the power to make the grant and for the mode and manner of its exercise, *Whitney* v. *United States*, 181 U. S. 104, 113; *United States* v. *Cambuston*, 20 How. 59, 63.

No authority in the governor of the territory to grant lands below ordinary high water mark, therefore, is presumed, and none is or can be shown under the applicable Mexican statutes.

The Mexican patent not only does not contain an express grant of the tide lands or submerged lands, but provides that any inclosures of the land granted shall not prejudice any crossings, roads and servitudes which existed under the Mexican laws. Hall's Mexican Laws, §1468, p. 448, after providing that rivers, ports and public roads belong to all men in common, says:

> And though the dominion or property (senorio) of the banks of rivers belongs to the owner of the adjoining estate, nevertheless, every man may make use of them to fasten his vessel to the trees that grow there, or to refit his vessel, or to put his sails or merchandise there. So fishermen may put and

> expose their fish for sale there, and dry their nets or make use of the banks for all like purposes which appertain to the art of trade by which they live.

See also Moreau & Carleton's Partidas (ed. 1820), vol. 1, tit. 28, law 6.

This would seem to be an express recognition in the patent that these lands granted on navigable waters were subject to the servitudes usual in such grants under Mexican laws and negatives the idea that the patent contained any express grant of the title below ordinary high water mark.

Carrillo's petition for patent (R. 25) described the west boundary (the one in question) as on the "west by the bay and ship anchorage." The order of the governor directing the issue of patent gives the boundary as "the land known or named 'Isla' or peninsula, in the port of San Diego towards the part of — of the anchorage." The Mexican patent describes the boundary as "west by the bay or anchorage for ships, as explained by the map which goes with the espediente." R. 27.

The petition to the land commissioners shows that the land had not been surveyed by the surveyor general (which was only necessary in order that patent might issue on confirmed claims under § 13 of the Act of March 3, 1851, 9 Stat. 631), because "such survey from the nature of the case being unnecessary, the boundaries being natural and not to be mistaken."

The map filed with the espediente, as set out in the Mexican patent, is not in the record in this case

and seems not to have been produced at the trial. A certified copy thereof from the Land Office is attached to this brief as an appendix, and a copy will also be found in the records of this court in the case of *United States* v. *Simmons*, No. 224 at the December term, 1863. From this map, which the Mexican regulations of 1828 required an applicant for a donation of vacant land to file, it is evident that the shore line on the west is meandered and none of the bay is included, and makes clear that the boundary given in the Mexican patent and in the petition therefor as the "bay or anchorage for ships," or "bay and ship anchorage," is but a description of the navigable body of water which forms the west boundary of the donation. Billings and others who petitioned the land commissioners for a confirmation of the grant fully recognized this when they asserted that the boundaries were natural and not to be mistaken, and a survey of the land, in order to segregate it from other land, was unnecessary.

That a Mexican grant bounded by the bay on navigable waters adjacent does not extend over the submerged lands or tide lands below ordinary high water mark is too well settled for argument. The language of this court in *Shively* v. *Bowlby*, 152 U. S. 1, 29, is conclusive:

> In *United States* v. *Pacheco*, it was decided that a grant from the Mexican government, confirmed by a decree of a court of the United States under authority of Congress, of land bounded "by the bay" of San Francisco, did

not include land below ordinary high water mark of the bay; because, as was said by Mr. Justice Field, in delivering judgment, "By the common law, the shore of the sea, and, of course, of arms of the sea, is the land between ordinary high and low water mark, the land over which the daily tides ebb and flow. When, therefore, the sea, or a bay, is named as a boundary, the line of ordinary high water mark is always intended where the common law prevails. And there is nothing in the language of the decree which requires the adoption of any other rule in the present case. If reference be had to the rule of the civil law, because the bay is given as a boundary in the grant from the Mexican government, the result will be equally against the position of the appellants." 2 Wall. 590.

3. *The effect of the* (*a*) *Decree and* (*b*) *Patent.*

When California became a part of the territory of the United States, unless there had been previous to that time an express grant by the Mexican government of lands below ordinary high water mark, *Shively* v. *Bowlby, supra*, pp. 13, 47, such lands were held in trust by the United States for the benefit of the future state. *Weber* v. *Harbor Com'rs*, 18 Wall. 57, 65, 66; *Shively* v. *Bowlby, supra; Knight* v. *Land Ass'n*, 142 U. S. 183.

While California was a territory of the United States, although Congress had *power* to grant *for appropriate purposes* titles or rights in soil below ordinary high water mark of tide waters, it has never done so by general laws and has adopted the policy

of leaving the disposition of sovereign rights in navigable waters and in the soil under them, to the control of the States when admitted to the Union, *Shively* v. *Bowlby*, *supra*, pp. 47, 58.

It is settled law, moreover, that when California was admitted to the Union September 9, 1850, she acquired absolute property and dominion over the soils under tide water within her jurisdiction. *Shively* v. *Bowlby*, *supra*; *Knight* v. *Land Ass'n*, *supra*, p. 183, and cases there cited.

While, therefore, Congress might have expressly granted or confirmed an imperfect Spanish grant of tide lands below ordinary high water mark while California was a territory, it had no such power after California became a State. *Goodtitle* v. *Kibbe*, 9 How. 470, 478; *Packer* v. *Bird*, 137 U. S. 661.

The inquiry is then, whether there was an express grant of these tide lands either by Mexico or Congress before California became a state. We have already shown that there was no authorization under the territorial colonization law of Mexico of 1824, subject to and in conformity with which the Mexican patent issued, for the territorial governor to grant lands below ordinary high water mark, tide lands or submerged lands, and that neither the Mexican patent nor the map therewith purported to cover any but the fast lands. We have further shown that there was no law of Congress granting lands below ordinary high water mark in California before her admission as a state. Moreover, the decree of the District Court (R. 33) confirming the claim of Billings and others did not

even purport to confirm a claim to any property other than that described in the petition and the documentary and other evidence in the case. It did not confirm the title to any land other than fast land described by natural bounds and according to the documents of title and map to which reference was had; that is to say, by descriptive language which according to all admissible rules of conveyancing would exclude adjacent lands lying below the line of high tide.

In the light of these facts we come to consider the effect of the survey of 1869 which embraces these lands. The court below held (see R. 525, p. 22) that the decree of the United States District Court for the southern district of California, confirming the Mexican grant and the patent issued by the land department in conformity with the plat of survey made by the surveyor general embracing these lands below ordinary high water mark, was conclusive on the United States, and, in effect, that even though there was error on the part of the land department in surveying and patenting the tide lands and submerged lands, its action could not be assailed in this proceeding.

Under the provision of the Act of July 27, 1917, in accordance with which this suit was brought to determine and appraise "any rights private parties may have in the said island over and beyond any rights thereto in the United States," and the provision empowering the court to distribute the award to private owners as their respective interests may be determined by the court, it may well be

contended that Congress thus authorized in this proceeding a direct attack upon the validity of the patent if in determining the rights of parties such direct attack should be necessary. Indeed, it will be remembered that the United States first invoked the equitable powers of the court (see R. 525) to determine the rights of parties, and in that proceeding a direct attack could be made and was to be made upon the patent.

We do not, however, rest the right to attack the patent in so far as it covers tidelands upon the sole proposition that this suit to determine the right of the parties is a direct attack upon the patent. We base it upon the broader ground that the lands in question in this case, below ordinary high water mark, were never within the jurisdiction of the Mexican governor of the territory of California to grant, were never granted in the Mexican patent, were never within the jurisdiction of the commissioners to settle private land claims in California, nor of the United States District Court in the proceedings confirming the Mexican grant, were never within the jurisdiction of the land department and were not subject to grant by it, and that the patent therefor is not merely voidable but is void, which facts can be shown in an action at law.

(a) DECREE.

Before discussing the jurisdiction of the land department we will advert to the ruling of the court that a decree of the United States District Court confirming the Mexican grant is conclusive in this proceeding.

In this decree (R. 33) it is adjudged that the title of the claimants "to the lands claimed by them, as set forth and described in their petition * * * is a good and valid title, and that their claim to the said land be, and the same is hereby, confirmed," and the boundary of the land in question is given "and west by the anchorage for ships according to the documents of title and map to which reference is had." No claim was specifically made in the petition for the extension of the grant to lands below high water mark. On the contrary, the petition alleges that the boundaries of the land were natural, and not to be mistaken, and that a survey thereof is unnecessary.

The question whether the grant embraced lands below high water mark, therefore, was never presented to the court, and no right to them was ever in the minds of the claimants at the time their petition was rejected by the land commissioners nor at the time it was confirmed by the court. It follows that translation of title to these tidelands can not be based upon this decree because the claim confirmed in terms does not embrace them. *Packer* v. *Bird*, 137 U. S. 661, 672.

The decree of confirmation is limited to the extent of the claim made and covered and protected nothing beyond. *Brown* v. *Brackett*, 21 Wall. 387. It merely established the validity of the claim as it then existed, it did not change the character of the grant.

As was said in *Henshaw* v. *Bissell*, 18 Wall. 255, 264, Mr. Justice Field speaking for the court in a case of conflicting patents:

> The protection which by the treaty the United States promised to the grantees extended to rights which they then held. The confirmation established the validity of the claims of the parties as they then existed; that is, it determined that their claims were founded upon concessions of the former government, which were genuine and entitled to recognition as far as they did not interfere with previously existing rights of others, which the government was also bound to respect. Confirmation established nothing more.

The decree of the District Court reversing the rejection of the Mexican grant by the land commissioners and confirming the grant, can not be extended to cover any class of property which was not included in the original grant. While, as has been shown, this decree can not properly be construed as even attempting to confirm title to property not included in the original grant, it is insisted that *even if it purported* to cover the submerged lands fronting the uplands covered by the Mexican grant, the special tribunal created by the Act of March 3, 1851, 9 Stat. 631, to determine the validity of claims to private grants made by the Mexican government, had no jurisdiction to determine the validity of claims to submerged lands. It is true authority was conferred on this tribunal to determine the acreage of quantity grants and the boundary of

definite claims. *United States* v. *Fossatt*, 21 How. 445, 449. But this authority was limited to lands which, in case claims thereto were rejected by the Commission or were nor presented within two years from the passage of the Act, would then be "deemed, held and considered as a part of the public domain of the United States." This is made apparent when we consider section 13 of the Act, which provides in part:

> That *all* lands, the claims to which have been finally rejected * * * or which shall be finally decided to be invalid * * * and *all* lands, the claims to which shall not have been presented * * * within two years * * * shall be deemed, held and considered *as a part of the public domain of the United States.* [Italics ours.]

The words "public domain" used here mean "public lands" which are subject to sale and disposition under the general land laws. *Newhall* v. *Sanger*, 92 U. S. 761; *Barker* v. *Harvey*, 181 U. S. 481, 490; *Mann* v. *Tacoma Land Co.*, 153 U. S. 273, 284.

In *Newhall* v. *Sanger*, the Supreme Court in holding that the term "public lands" as used in the legislation of Congress meant such lands as are subject to sale or other disposition under general laws, was considering the effect of the Act of March 3, 1851, and especially whether valid claims could be initiated to lands *sub judice* under that Act prior to March 3, 1853, even though the Mexican grant thereto should be false and fraudulent and should thereafter be rejected. The court pointed out that no right of pre-

emption previously attached to lands in California before the passage of the Act of March 3, 1853, c. 145, 10 Stat. 244, 246, § 6, and that the legislation of Congress (page 764) "was so shaped that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim, until it was barred by lapse of time, or rejected." But the Act of March 3, 1853, c. 143, 10 Stat. 244, conferred upon a settler on lands theretofore reserved on account of claims under foreign grants then or thereafter declared invalid, the rights granted by the preemption law after such lands should be released from reservation, "a class of lands which, from an early day, it had been the policy to reserve until the adjustment of all such claims." Page 765.

The object of the creation of the special tribunal to settle private grants in California was to segregate them from the "public domain," and thus open up a vast area of that domain in California to settlement under the homestead and preemption laws. As shown above, settlement under these laws had been held up by Congress in order that the valid private grants, which by the treaty and the law of nations the United States was bound to respect, might be definitely located.

As was said in *Botiller* v. *Dominguez*, 130 U. S. 238, 249, "the main purpose of the statute was to separate and distinguish the lands which *the United States owned as property*, which could be sold to others [Italics ours] * * * from those lands which be-

longed * * * to private parties" under Spanish or Mexican title. "When this was done the aim of the statute was attained. The order of the commissioners * * * enabled the government of the United States out of all its vast domain to say 'this is my property,' and also enabled the claimant, * * * who had a just claim * * * to say 'this is mine.' "[1]

There are no presumptions in favor of the jurisdiction of the courts of the United States, *Ex parte Smith*, 94 U. S. 455, and the subordinate judicial tribunals of the United States can exercise only such jurisdiction as may be authorized by Act of Congress, *Kentucky* v. *Powers*, 201 U. S. 1. *A fortiori*, there was no presumption in favor of the jurisdiction of this special tribunal, and we must look to the Act creating it to determine its jurisdiction and to ascertain whether the power sought to be exercised is lawful.

[1] The following statutory provisions show the purpose of Congress to facilitate the definite location, survey and settlement of public lands in California: Act of March 3, 1851, c. 41, 9 Stat. 631, §13, providing for survey after confirmation; Act of August 31, 1852, c. 108, 10 Stat. 76, 91, directed surveys of certain unconfirmed claims; Act of March 3, 1853, c. 145, 10 Stat. 245, §3, directed survey of private claims so far as necessary to complete surveys of public lands; Act of June 14, 1860, c. 128, 12 Stat. 33, which authorized the courts to adjudicate and settle surveys. This was later repealed by Act of July 1, 1864, c. 194, 13 Stat. 332, and the Land Office clothed with power to approve and correct surveys. Act of July 23, 1866, c. 219, 14 Stat. 220, §8, directed the Surveyor General, in cases where claimants neglected to request a survey, to extend the lines of the public surveys over such Spanish or Mexican claims.

United States v. *Santa Fe*, 165 U. S. 675, 714. This being true, the jurisdiction of this tribunal to extinguish the sovereign rights of California in its presumptive title to all its submerged lands will not be presumed but must clearly appear. It must be remembered that at the time Congress created this special tribunal California was a sovereign State of the Union, with full dominion and sovereignty over the lands within the state below ordinary high water mark. Indeed, the California Enabling Act of September 9, 1850, c. 50, 9 Stat. 452, 453, provides specifically that "all the navigable waters within the said state shall be common highways, and forever free, as well to the inhabitants of said state as to the citizens of the United States."

It is respectfully submitted that it was not the purpose of Congress to submit to this special tribunal the right to extinguish this presumptive title in the state of California to the submerged lands within her jurisdiction, nor to compel her in all cases to submit her sovereignty to the jurisdiction of these land commissioners.

The declaration of the Act creating this tribunal that *all* the lands to which claims are rejected, and to which claims are not seasonably presented, shall be deemed, held and considered as a part of the public domain of the United States, would seem to expressly limit the jurisdiction of the tribunal so that it does not extend to that class of lands which, if claims thereto are rejected, must be deemed, held and considered not as a part of the public domain of

the United States but as a part of the lands under the sovereignty and dominion of the State of California.

In this connection there is no reported case, so far as we have been able to discover, where the land commissioners of California passed upon the claim of a private grantee to full ownership and control of lands below ordinary high water mark.

(b) PATENT.

> In discussing the effect of the patent we submit: first, considered from its four corners, together with the survey and plat to which it refers, it does not cover the lands below high water mark; and second, even though it could be construed to embrace such lands, it is void as to them.

The plat of the survey which is attached to the record was introduced in evidence in the case, but the field notes were not. A certified copy of these field notes from the General Land Office has been filed with the clerk of this court, and extracts therefrom are printed as an appendix to this brief. These field notes form part of the survey and are to be considered with the plat to which they relate. *Heath* v. *Wallace*, 138 U. S. 573, 583.

In the patent (R. 37) the text of the decree of confirmation is set out, describing the land as "the island or peninsula of San Diego," and its western boundary as "west by the anchorage for ships according to the document of title and maps to which reference is had." After referring to the plat of survey

the land granted was described as "the tract of land embraced and described in the foregoing survey."

The decree of confirmation and the patent both speak of the land granted as an island or peninsula. These words have a well-known and generally understood meaning, the former as land entirely surrounded by water, and the latter as land nearly surrounded by water and connected with a larger body by a neck or isthmus. There is nothing in the Mexican patent, the petition for confirmation, the decree of confirmation, or the terms of the patent from the United States, to disclose that any lands covered by water were included or intended to be included in the grant, but by examining the plat of survey it is observed that the surveyor general has run, on the western boundary, two lines, one meandering ordinary high water mark on the shore, and expressly noted as such on the plat, and the other out to the deep channel used by ships in entering and leaving the harbor, and at one point on line No. 21 beyond the center of the bay of San Diego. It was held by the court below that, by this action of the surveyor general and the patent issued in conformity with the survey, the submerged land between the line of ordinary high water mark shown on the plat between stations 19 and 27, and the line shown on the plat as Nos. 19, 20, 21 and 22, was privately owned land of defendant.

While, as pointed out, this plat shows two lines on the western boundary, an examination of the field notes shows that only one of these lines was actually

run upon the ground, to wit, that marking the line of ordinary high-water mark. The field notes disclose that the surveyor actually meandered the shores of the bay, monumented the line of survey, and gave the call for every station on the shore line from station 19 to 58, inclusive (Field Notes, pages 4 to 10), with the courses and distances, but show indisputably that the surveyor never actually ran the line which he called "anchorage for ships." The survey was begun at a point at high water mark on the Pacific Ocean, shown by Carrillo, the original Mexican patentee, as the southwest corner of the rancho patented to him by the Mexican Governor of California, and the northwest corner of the rancho of San Augustin Melisse. From this point the surveyor proceeded north along high water mark on the ocean until he reached station No. 19. After reaching that station the field notes say (page 3):

> From this station in order to fix the western boundary of the tract at the anchorage for ships, named in the decree of confirmation, I project a line due west 7.00 chains to the edge of the deep water or channel shown by the map of the U. S. Coast Survey as such anchorage and from thence I project another line along the eastern edge of the deep water or anchorage for ships shown by the map of the U. S. Coast Survey as aforesaid due north 81.00 chains.
>
> And running the traverse line of high water mark around the bay to the Inlet or "Estero" from station No. 19 as follows:

Then follow the courses and distances and various stations from station No. 19 around the shore line of the island to station No. 58, inclusive. After reaching this station the field notes say:

> And from this station I project a line due west 93.00 chains to the edge of the deep water or anchorage for ships as shown by the aforesaid map of the U. S. Coast Survey and by tabling up the traverse of the shore line from Station No. 19 to station No. 58, and the aforesaid projected lines of the western boundary by aid of the map of the U. S. Coast Survey in ascertaining the true anchorage for ships, I find the line from the projected line of 93.00 chains and of the one of 81.00 chains north from the end of the 93.00 chains to be S. W.—chains.
>
> Therefore from station No. 19 the courses and distances of the true boundary are as follows:
>
> End of traverse line; thence west 7.00 to the deep water or anchorage for ships; thence north along the E. edge of the channel or deep water constituting the anchorage for ships as shown by the maps of the U. S. Coast survey 81.00 to curve of line of deep water to the eastward; thence N 48¾ E along same 83.00 to station; thence east 93.00 to station No. 58 of the shore traverse before mentioned from which station the Quartermaster's Storehouse (sometimes used as barracks) at New San Diego bears S 84½ E from this store the meander corner of fourth standard South Range 3 West of San Ber-

nardino Meridian, situated 17.60 chs. west of cor. to secs. 2 and 3; bears N 11½ W distant 100 chains and 36 links.

From these extracts from the field notes it is apparent that the surveyor erroneously assumed that the description of the west boundary set out in the decree, "on the west by the anchorage for ships"—a navigable body of water—required him to project the lines of the survey across the waters of the bay to the deep water channel used by ships entering or leaving San Diego harbor, as shown by some map of the Coast Survey. Projecting these lines was a mere paper survey and not an actual survey on the ground. The plat shows the imaginary stations out at deep water, but none were monumented on the ground by buoys or otherwise, nor are any bearings given, the projected lines being designated as Nos. 19, 20, 21 and 22.

Even if the field notes did not contain the definite statement that these lines were by aid of a coast survey map merely projected, the fact that the edge of the deep water channel is not meandered, and that the soundings shown on plaintiff's exhibit 10 (R. 41) at the line which the surveyor called "anchorage for ships," disclosed such a great depth of water at the assumed stations, preclude any assumption that the courses were actually measured and marked.

The attention of the court is invited to a letter from the Commissioner of the General Land Office, attached to this brief as an appendix, stating that

the lines of the figurative survey failed to close where the projected lines Nos. 21 and 22 are presumed to meet, and that in order to close the alleged survey a line north 28 degrees, 7 minutes east, 7.09 chains, will have to be projected.

Returns by a surveyor general embracing the descriptions of a survey of land are prima facie evidence, and plats and certificates, on account of the official character of the surveyor general, have accorded to them the force and effect of a deposition, *United States* v. *Hanson*, 16 Pet. 200, 201, but "it is not the mere assertion of a surveyor that he had surveyed land that makes it so;" *Winter* v. *United States*, 30 Fed. Cas. 350, 365, and the admission of the survey in evidence does not admit its validity. *United States* v. *Brevard*, 16 Pet. 143, 146.

The legal effect of a survey must be determined not by what the surveyor said but by what he did. In considering the effect of a survey as evidence this court in *Ellicott* v. *Pearl*, 10 Pet. 411, 441, said:

> The survey, made by a surveyor, being under oath, is evidence as to all things which are properly within the line of his duty. But his duty is confined to describing and marking on the plat, the lines, corners, trees and other objects on the ground, and to subjoin such remarks as may explain them; but in all other respects, and as to all other facts, he stands, like any other witness, to be examined on oath in the presence of the parties, and subject to

> cross-examination. The reason why a survey, made by a public surveyor in discharge of his public duties, is admitted as evidence, in suits between other parties, is not that it is hearsay; but that the act is officially done under oath, and in discharge of his duties to the government and the public. But it has never been supposed that if, in such a survey, the surveyor should go on to state collateral facts or declarations of the parties, or other matters not within the scope of his proper official functions, he could thereby make them evidence as between third persons.

In *Winter* v. *United States*, *supra*, the District Court of Arkansas, in determining what was necessary to constitute a survey, said (p. 365):

> It is also quite evident that a survey under the Spanish government meant, as with us, the actual measurement of land, ascertaining the contents by running lines and angles, marking the same, and fixing corners and boundaries.

After quoting as above from *Ellicott* v. *Pearl*, *supra*, the court further said as to that case (p. 365):

> This case is cited because in pointing out the duty of a surveyor of land, it clearly shows the nature of a survey and what must be understood by it; namely, running lines with compass and chain, establishing corners, marking trees and other objects on the ground, giving bearings and distances, and making descriptive field notes and plots of the works. These are the ingredients of an actual survey, as well as the evidences of it;

> for it is not the mere assertion of the surveyor that he had surveyed land that makes it so. U. S. v. Hanson, 16 Pet. [41 U. S.] 200.

In *Muse* v. *Arlington Hotel Co.*, 68 Fed. 637, it was held that the grant papers covering a Spanish grant in Louisiana were ineffectual because, among other reasons, there was no showing of an actual survey on the ground.

A survey not made upon the ground, but merely upon paper, is declared by this court in *United States* v. *Lauton*, 5 How. 10, 27, to be fictitious and not effective to sever from the public domain land claimed under a Spanish grant in Florida. The court said (p. 27):

> In December, 1817, Geo. Clarke, the surveyor-general of the province, filed a plat and certificate of survey in his office, purporting to have been made of this grant, but no proof was offered to show that any such survey had ever been made by Clarke on the ground, and the Superior Court expressed its apprehensions that the survey was fictitious, as appears by the opinion found in the record; yet, as it might turn out otherwise on search being made on the ground, and as the survey might reasonably conform to the calls of the concession, should landmarks be found, a search and resurvey was ordered, and one was made and returned to the court by Gould, corresponding as near as might be, in the judgment of the surveyor, to the lines laid down on Clarke's plat, at the upper end of Dunn's lake. But no linemarks were found

> that had been made by Clarke, and his plat and certificate proved to be merely fictitious, his work not extending beyond what he had done on paper.

And again (p. 27):

> In the first place we are of opinion that the fictitious plat and certificate of Clarke can have no influence in fixing the identity of the land granted.

In *Scull* v. *United States*, 98 U. S. 410, a map was attached to the figurative survey, and the surveyor testified that from the map he could survey land and mark out its metes and bounds, and that he had made an accurate survey of the land claimed. The survey was made by conjecture because it was impossible for the surveyor to make an actual survey at the time. It did not appear that an actual survey had ever been made locating the grant. There was a map prepared subsequently by an engineer (p. 421) which showed the correct location of the grant not made by actual survey, but taking a sectional map of Arkansas and locating the grant on that map. As one of the essentials upon which title under the Spanish grant could be sustained, the court said (p. 419):

> The land must have been identified by an actual survey with metes and bounds, or the description in the grant must be such that judgment can be rendered with precision by such metes and bounds, natural or otherwise.

And in rejecting the claim it was said (p. 424):

> We are of opinion that for want of any actual survey at the time the grant was made, or at any other time, by the Spanish government, for want of any other separation of the land granted from the mass of the public domain, and for want of any description of the land granted in the instrument of cession or order of survey, by which the land can be surveyed and identified, the claim does not come within the eleventh section of the act of 1869, and that the District Court properly rejected it.

If the plat and field notes of this survey have accorded to them the force and effect of a deposition, *United States* v. *Hanson*, *supra*, we can look to the deposition for the purpose of determining the effect of the surveyor's acts. In his field notes this officer frankly stated that he projected lines out on navigable water by locating the lands on some coast survey map. In other words, he prepared his map or plat of the submerged land, not by actual survey on the ground but by locating land on the coast survey chart. This plat survey of the submerged land, therefore, corresponds exactly with the map prepared by the engineer in the *Sculi* case, *supra* (p. 421), by locating the grant in Arkansas upon a sectional map of that state, which the court denounced as not an actual survey by metes and bounds, and for want of which it rejected the claim to the Spanish grant.

Further than this, as we have before shown, a computation of the elements by which the surveyor

established these conjectural lines discloses that these lines fail to close by a distance of approximately 465 feet. This inaccurate paper survey can not be held to enlarge the terms of the decree and patent so as to embrace lands which are not those specified in the decree and patent as an island or peninsula. The submerged lands and the high lands are naturally and legally separate and distinct, were each separately surveyed by the Surveyor General, and are separately shown on the plat of survey annexed to the record. The decree of confirmation confirmed the title to the island or peninsula as shown on the original map filed with the Espediente, which embraced only the high land. The patent quotes the language of this decree in describing the land according to this map. The descriptive language of the patent referring to the subsequent survey, before quoted herein, is "the tract of land embraced and described in the foregoing survey." As pointed out, this survey described two tracts, one, land in its ordinary sense of visible high land, the other, invisible land, the soil under the sea. To construe the *patent* as describing this invisible soil under the sea is to give undue weight to an act of the surveyor wholly outside his official duty and to one expression in the instrument at the expense of the rest of it, and to convict the patent of glaring inconsistencies and of a clear departure from the terms of the decree of confirmation which it was to effectuate.

The reasonable construction of the patent, in the light of the original map and the decree of confirma-

tion, as well as from the terms of the patent itself, is that the act of the Surveyor General in separately platting on paper the soil under the sea was "not within the scope of his proper official functions," and that the island or peninsula, "the tract of land embraced and described in the foregoing survey," title to which passed by the patent, was the fast land as surveyed and monumented on the ground and as indicated on the plat. This construction makes all parts of the patent consistent, harmonizes the Mexican grant, the decree confirming it, and the well established policy of Mexico and the United States not to grant to individuals the soil under the sea. Further, it gives to the grantee all the land actually surveyed and excludes only the imaginary line projected more than half way across the entrance of the harbor of San Diego, after the survey of the island or peninsula had been accomplished, and upon computations from data afforded by some map from the Coast Survey.

It is respectfully urged, therefore, that the patent properly construed does not embrace these submerged lands. If, however, it can be construed as intending to embrace such lands, it is to this extent void and subject to collateral attack.

The effect of patents issued in confirmation of Mexican grants has been frequently stated by the court. In the earlier decisions it was said when the Government issued the patent confirming these grants it was in the nature of a quitclaim, but recently the court has held that it is more accurate to

say that the action of the United States is a confirmation rather than a quitclaim.

In *Los Angeles Milling Co.* v. *Los Angeles*, 217 U. S. 217, 227, Mr. Justice Day, speaking for the court, said:

> This court, speaking by Mr. Justice Miller, tersely disposes of the nature of such old Mexican titles in *Adam* v. *Norris*, 103 U. S. 591, 593:
>
> "But the United States in dealing with parties claiming under Mexican grants, lands within the territory ceded by the treaty of Mexico, never made pretense that it was the owner of them. When, therefore, guided by the action of the tribunals established to pass upon the validity of these alleged grants, the Government issued a patent it was in the nature of a quitclaim—an admission that the rightful ownership had never been in the United States but had passed at the time of the cession to the claimant, or to those under whom he claimed. This principle has been more than once clearly announced in this court. The leading cases are *Beard* v. *Federy*, 3 Wall. 478; *Henshaw* v. *Bissel*, 18 Wall. 255; *Miller* v. *Dale*, 92 U. S. 473."
>
> It is perhaps more accurate to say that the action of the United States in such cases is a confirmation rather than quitclaim. *Boquillas Land & Cattle Co.* v. *Curtis*, 213 U. S. 339, 344.

The court, refusing to review the judgment of the state court on the ground that no federal question was involved, again pointed out that the Act of March 3, 1851, "did not originate federal rights or titles, but merely confirmed the old ones," and said (p. 233):

> And whatever the rule may be as to patents conveying title to the lands of the United States, it has been distinctly held in this court that neither the treaty of Guadalupe Hidalgo nor patents under the Act of March 3, 1851, are original sources of private titles, but are merely confirmatory of rights already accrued under a former sovereignty.

In *Boquillas Cattle Co.* v. *Curtis*, 213 U. S. 339, 344, the court through Mr. Justice Holmes points out that the patent of the United States only confirms the Mexican title but does not release that of the United States, saying:

> But while it is true that in *Beard* v. *Federy*, *sup.*, Mr. Justice Field calls such a patent a quitclaim, we think it rather should be described as a confirmation in a strict sense. "Confirmation is the approbation or assent to an estate already created, which, as far as is in the confirmer's power makes it good and valid; so that the confirmation doth not regularly create an estate; but yet such words may be mingled in the confirmation, as may create and enlarge an estate; but that is by force of such words that are foreign to the business of confirmation." Gilbert, Tenures, 75. It is not to be understood that when the United States executes a document on the footing of an earlier grant by a former sovereign it intends or purports to enlarge the grant. The statute under which the Mexican title was decided to be good speaks of confirmation throughout, and, in the most pertinent passage, directing a patent to be

issued, says that it shall be issued "to the confirmee."

In the light of these authorities, which might be almost indefinitely extended, the right to collaterally assail a patent which embraces lands below ordinary high-water mark depends upon whether the land department had jurisdiction of these tide and submerged lands. Since the land department had neither by survey nor patent the right to enlarge the grant, this, in turn, depends upon whether there was an express grant of these tide lands and submerged lands by the former government. We have demonstrated not only that they were not expressly granted in terms by the Mexican patent, but that that patent in terms protects the servitudes which then existed under the laws of Mexico to use the roads, ports, and banks of the streams for public purposes; and further, that the Governor of California, who issued the patent, had no power to convey the common property of the Mexican people.

Upon the admission of California as a State, therefore, no express grant of lands below ordinary high-water mark having been made by the former government, it can not be asserted that such lands by any possibility became a part of the public domain of the United States, or were in any sense subject to the control of the land department; or that the land department or its surveying agencies had power to determine any question of title thereto. *Iowa* v. *Rood*, 187 U. S. 87, 93.

Questions of fact within the jurisdiction of the Land Department are conclusively settled by rulings preliminary to patent, but the want of authority of that department to issue the patent may be shown by extrinsic evidence. This is settled by many decisions of this court.

In *United States* v. *Stone*, 2 Wall. 525, it was held that land within a military reservation was not subject to patent and that patent therefor was void.

In *Doolan* v. *Carr*, 125 U. S. 618, the previous cases on the subject are carefully reviewed. Carr claimed under a prior valid Mexican grant, confirmed by the land commissioners and by the court, which was surveyed. Doolan claimed under a patent from the United States to the Central Pacific Railroad Company, patent being issued under the Act of Congress to aid in constructing railroads. Carr, in order to show that the patent to the railroad company was issued without authority of law and therefore void, offered evidence of the prior Mexican grant, which evidence was rejected by the trial court. This court, through Mr. Justice Miller, after pointing out that patents issued by the Government were at all times subject to inquiry whether such officers had lawful authority to make a conveyance, said (p. 625):

> But if those officers acted without authority; if the land which they purported to convey had never been within their control, or had been withdrawn from that control at the time they undertook to exercise such authority, then their act was void—void for want of power in

> them to act on the subject-matter of the patent, not merely voidable; in which latter case, if the circumstances justified such a decree, a direct proceeding, with proper averments and evidence, would be required to establish that it was voidable, and should therefore be avoided. The distinction is a manifest one, although the circumstances that enter into it are not always easily defined. It is, nevertheless, a clear distinction, established by law, and it has been often asserted in this court, that even a patent from the government of the United States, issued with all the forms of law, may be shown to be void by extrinsic evidence, if it be such evidence as by its nature is capable of showing a want of authority for its issue.

The cases are reviewed in *Knight* v. *Land Ass'n, supra,* where *Doolan* v. *Carr* is approved.

In *Burfenning* v. *Chicago, St. Paul &c Ry.*, 163 U. S. 321, plaintiff brought an action to recover possession of lands within the territorial limits of the city of Minneapolis, claiming under a patent from the United States land issued to him as an additional homestead granted to soldiers and sailors who served in the war of the rebellion. The patent was attacked on the ground that lands within the limits of any incorporated town already selected as the site of a city or town were excluded by statute from preemption and homestead. Plaintiff contended that the patentability of the lands was a question of fact for the land department to determine, and that its determination in the case was conclusive that the lands

were not at the time the patentee's rights were initiated within the limits of any city. After restating the rule that questions of fact are for the exclusive determination of the land department, the court said (p. 323):

> The case of *Morton* v. *Nebraska*, 21 Wall. 660, is very closely in point. In that case the plaintiff held a patent for lands in Nebraska which were saline lands, and noted as such on the field books, although the notes thereof had not been transferred to the register's general plats. The preemption act of September 4, 1841, c. 16, 5 Stat. 453, 456, declared that "no lands on which are situated any known salines or mines shall be liable to entry." Notwithstanding this prohibition patents were issued for the lands, and it was held that they were absolutely void, the court saying, p. 674: "It does not strengthen the case of the plaintiffs that they obtained certificates of entry, and that patents were subsequently issued on these certificates. It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."

In *Salt Lake Inv. Co.* v. *Oregon Short Line*, 246 U. S. 446, there were conflicting claims for land in

Utah—one under the preemption law and the other under the statute granting a right of way to a railroad company. It appeared that the railroad was completed and in operation for its entire length before the issuance of patent to the homesteader, but prior to the settlement of the homesteader the lands were within the incorporated limits of Salt Lake City. Mr. Justice Van Devanter, speaking for the court, said (p. 448):

> In the case of *Burfenning* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 163 U. S. 321, a plaintiff in ejectment relied on a patent issued under the homestead law, which adopted the excluding provision of the preemption act, and his title was challenged on the ground that the entry and patent were for land within the corporate limits of Minneapolis. This court observing, first, that the record affirmatively disclosed that the land was in the city limits when the claim was initiated, and second, that the case was not one where a finding by the Land Department on a question of fact resting on parol evidence was sought to be drawn in question, held the patent void under the general rule that "when by act of Congress a tract of land has been reserved from homestead and preemption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent, transfer no title, and may be challenged in an action at law."

> Applying these views, we think MacDuff's settlement and declaratory statement under the preemption act were of no effect. They neither conferred any right on him nor took any from the Government. His claim was not merely irregular or imperfect, but was an impossible one under the law, and so the status of the land was not affected thereby. The land continued to be subject to the disposal of Congress and came within the terms of the right of way act as much as if he were making no claim to it. Of course, the presence on public land of a mere squatter does not except it from the operation of such an act containing, as here, no excepting clause.

If the Land Department is without jurisdiction to patent lands in a military reservation, lands covered by a prior valid Mexican grant, or to issue patents under the homestead law to lands within the territorial limits of a city, or to lands which were theretofore classified as saline or otherwise previously segregated from the public domain, it is equally clear that that department is without jurisdiction to patent lands which had theretofore passed under the dominion and sovereignty of a sovereign state.

It is further settled that Congress has never clothed the Land Department with power by approval of surveys to determine questions as to the title of lands under water, or to adjudicate anything whatever on the subject. *Iowa* v. *Rood, supra.*

II.

At most, defendant company's right, title or interest, if any, in the lands below high water mark are subject to the paramount servitudes and powers of the federal and state governments to protect navigation, commerce, and fishery.

The court instructed the jury that defendant company, in the 663 acres of land, termed "tide lands" (R. 103) "has all the rights of full ownership, subject to the reasonable public regulation;" that the present bulkhead line "is a reasonable public regulation," beyond which a solid fill is not permissible without the consent of the government;" that the present pierhead line is a reasonable regulation, "and between that line and the bulkhead line open wharves may be constructed and used by the owner. But it is a property right and an attribute of the ownership of the Coronado Beach Company that it may construct wharves, docks, piers, warehouses, terminals, or other improvements on these submerged lands, subject to these regulations; and in so constructing such improvements the Coronado Beach Company would be exercising the right to use its privately owned tidelands."

Conceding, *arguendo* only, that the Mexican grant covered lands below ordinary high water mark, the vice of these instructions is that the jury was told that the private ownership and use of such lands were subject only to existing federal regulations as to the harbor lines, and that the lands must be valued by the jury in view of such rights of exclusive owner-

ship and subject, as before said, only to existing regulations of bulkhead and pierhead lines as now fixed by the United States government.

This instruction tells the jury that the private ownership of these submerged lands is full and complete and subject only to existing harbor lines. This is a denial of the power of the federal government to establish and change these harbor lines at pleasure.

It is well settled that this power of the sovereign state or nation is perpetual and is not exhausted by one exercise, and that all privileges granted in public waters are subject to that power, the exercise of which is not a taking of private property for public use but the lawful exercise of a governmental power for the common good. *West Chicago Railroad* v. *Chicago*, 201 U. S. 506; *Greenleaf Lbr. Co.* v. *Garrison*, 237 U. S. 251.

In *Greenleaf Lbr. Co.* v. *Garrison*, the company sought an injunction against the Secretary of War to enjoin interference with complainant's wharf or other property "along or upon the water front of its said property upon the southern branch of the Elizabeth River in the State of Virginia." It was alleged that the wharf was constructed under the authority of the State, and within and upon the harbor line subsequently established by the Secretary of War, and that therefore it was property lawfully owned and could be removed only upon payment of just compensation. The cases are fully reviewed in the opinion of Mr. Justice McKenna, and the court held that while the

states exercise certain control and management of streams within their territory, this control is subject to be superseded by the interference of Congress and is not dependent upon the depth or the shallowness of the water; that the power having been delegated to the Secretary of War to establish harbor lines, this power necessarily required the removal of structures which projected beyond the harbor lines, and that such removal was not a taking of the wharf for public use but was the lawful exercise of governmental power for the common good.

In *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 62, it was said that the title of the owner of fast lands upon the shore of a navigable river to the bed of the river is at best a qualified one, but while capable of distinctive ownership it passed with the ownership of the shore as the shadow follows the substance. The title, however, was held to be subordinate to the public right of navigation, and that if in the judgment of Congress the use of the bottom of the river was necessary for the purpose of placing structures in aid of navigation, such use was not taking private property for public use, for the owner's title was in its very nature subject to that use, and if structures were placed in navigable waters which were an obstruction or hindrance to navigation, they may be removed and the injurious use of the bed of the stream by the owner forbidden.

So, also, Congress may permit the construction of tunnels, and require the removal of any such structure built with or without its license. Quoting from

Scranton v. *Wheeler*, 179 U. S. 141, 163, the court pointed out that whatever the nature of the interest of a riparian owner of lands in front of his upland bounding on a public navigable water, his title is not as full and complete as his title to fastland but was a qualified title, "a bare technical title, not at his absolute disposal, as is his upland, but to be held *at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.*" [Italics ours.]

In *Los Angeles Milling Co.* v. *Los Angeles*, *supra*, and cases there cited, the extent and character of the rights annexed to the ownership of property acquired in pursuance of the confirmation of grants under the Act of March 3, 1851, were held not to be determined by the judgment of the land commissioners, but were matters of local or general law.

In the case of *People* v. *California Fish Co.*, 166 Calif. 576, 138 Pac. 79, the Supreme Court of California held that the holder of a patent from the state for tide lands does not thereby acquire the entire title and interest in such lands, but they are subject to the easement and servitude of the public for the purposes of navigation and commerce whenever necessary for such public purposes. The court points out that the constitution of the state deprives the legislature of the power to dispose of tide lands fronting upon navigable waters so as to entitle the grantee to destroy or interfere with the public easement for navigation.

Indeed, it has been settled in the United States that the state is without power to abdicate its trust in navigable waters and can make no disposition of them prejudicial to the right of the public to use them for purposes of navigation and commerce, and whether such title remains in the state or has passed into private ownership, the sovereign control both of the state and nation for such public purposes remains the same. In discussing the power of the United States to protect navigation the court, in *People* v. *California Fish Co., supra,* said (p. 600):

> For the present, therefore, and until the federal authority interferes, the state has the same interest in these lands, and the same power over them, as if the harbor lines had not been fixed by federal authority. The defendants have no right to interfere with this power, or to curtail it, on the ground that the United States may do so in the future.

See *Cummings* v. *Chicago,* 188 U. S. 410, 431.

In *United States* v. *Cress,* 243 U. S. 316, 319, it was said (Mr. Justice Pitney speaking for the court):

> The States have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders both navigable and non-navigable, and the ownership of the lands forming their beds and banks (*Barney* v. *Keokuk,* 94 U. S. 324, 338; *Packer* v. *Bird,* 137 U. S. 661, 671; *Hardin* v. *Jordan,* 140 U. S. 371, 382; *Shively v. Bowlby,* 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co.* v. *St. Paul*

> *Water Com'rs*, 168 U. S. 349, 358), subject, however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the States and with foreign nations (*Shively* v. *Bowlby*, 152 U. S. 1, 40; *Gibson* v. *United States*, 166 U. S. 269, 272; *Scott* v. *Lattig*, 227 U. S. 229, 243.) * * *.

By the instructions to the jury as to the extent of the private ownership of these submerged lands, they were told that the contemplated magnificent improvements, as shown by the map, Exhibit D of the record, could go on unimpeded by any regulations of either state or nation, and that the private ownership derived from the Mexican government freed these lands from any regulation by California designed to protect the navigable capacity of her harbor entrance, and from any future regulation by the federal government that might be necessary to protect the rights of navigation or the military post across the bay. As to the extent of the claim of defendant company upon which these instructions were based, the following colloquy is illuminative (R. 41, 42):

> The COURT. What do you claim, then, is your right beyond high water mark, out to this survey, the edge of the anchorage—what is your claim?
>
> Mr. DUNNE. Our claim is that we have the right to build wharves and other structures in utilization of our tide lands.

The COURT. Without a franchise?

Mr. DUNNE. Absolutely. We are private owners. * * *

It is unnecessary to argue that the grant from the Mexican government, however far it embraced the lands below ordinary high water mark, did not destroy the sovereignty of the United States over those lands, nor impair its power to protect its public waters for the common good. Nor can it be seriously asserted that the grant from the Mexican government gave a higher character of title to the grantees no matter how far into navigable waters the grant might have extended, than is conferred upon patentees from the state of California of tide lands therein; and from the foregoing discussion we submit that it is obvious that no matter what the character of the title of defendant company may be to the tide or submerged lands, such title is subject, first, to the paramount authority of the federal government to protect its public waters for the common good, and second, to the concurrent, though subordinate, power or authority of the state to regulate and control its public waters in the interest of the common rights of navigation and commerce.

The value of the high land assessed by the jury was based upon the erroneous instruction that defendant company was the "private owner" of the land under the sea and not subject to the paramount rights of the federal and state governments. We insist that "the government can not be justly required to

pay for an element of value which did not inhere in" the high land. *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 75, 76.

In this connection the case of *Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, is illuminating. In that case the Chamber of Commerce owned a private way which the city sought to condemn for a public street. The Central Wharf and Wet Dock Corporation had an easement of way, light and air over the land, and the Savings Bank held a mortgage on the land subject to the easement. These were the only parties in interest and they filed an agreement that the damages might be assessed in a lump sum. The city refused to assent to such an assessment, insisting that the damages must be assessed according to the condition of the title at the date of the order laying out the street. The Chamber of Commerce, the Dock Corporation, and the Bank insisted that they should recover together the full value of the unrestricted fee to which they asserted they were entitled by virtue of the Fourteenth Amendment to the Constitution. It was agreed that if the value of the unrestricted fee could be recovered damages should be assessed at $60,000, but if the city was right that the damages must be assessed according to the condition of the title at the date of the order laying out the street, the damages should be $5,000. The court, speaking through Mr. Justice Holmes, said (p. 195):

> But the Constitution does not require a disregard of the mode of ownership—of the

state of the title. It does not require a parcel of land to be valued as an unencumbered whole. It merely requires that an owner of property taken should be paid for what is taken from him. It deals with persons, not with tracts of land. And the question is what has the owner lost, not what has the taker gained. We regard it as entirely plain that the petitioners were not entitled as matter of law to have the damages estimated as if the land was the sole property of one owner, and therefore are not entitled to $60,000 under their agreement.

III.

In any event, Congress did not authorize by the Act of July 27, 1917, condemnation of the tide lands.

At the trial in the court below (R. 42, 45), it was contended on behalf of the Government that the statute authorizing the taking of the whole of North Island and the determination and appraisal of any rights private parties may have in the island over and beyond the rights of the United States, did not embrace any of the submerged lands, and that Congress did not intend that title should be acquired to any of the land below ordinary high water mark, nor that there should be any condemnation of such land. The court (R. 45) expressed the opinion that if the "government should simply claim in this proceeding the high lands and divest itself of any claim of this subaqueous land, that then the defendant would have a right to file a cross complaint to have that assessed under this law." While there were separate

verdicts valuing the high lands, the marsh lands and the lands below high water mark, the court entered judgment against the Government under the general verdict for $5,000,000, the total value of the land as found.

Ordinarily, it must be conceded that the Government would have the right to condemn such portions of land as it might need for public purposes, but it was asserted by defendant company and held by the court that the Act of Congress authorized the condemnation *of the whole of the island*, which term included the three classes of land.

For the purpose of determining what Congress meant to include by the term "the whole of North Island," it is necessary to examine the history of the legislation leading up to the Act directing the President to take possession thereof.

Congress, by an Act approved March 4, 1915, c. 143, 38 Stat. 1064, authorized the appointment of a commission to investigate and report as to the necessity, desirability and advisability of establishing submarine and aviation bases, among other places, on the Pacific coast. The resolution, which afterwards became the Act, authorizing the taking of possession of North Island by the President, hereinbefore set out, passed the House of Representatives and was sent to the Senate, and accompanying it when it was reported to the Senate, was Senate Report 83 (65th Congress, 1st sess.; Cong. Rec. vol. 55, pt. 5, p. 5100). With this report is submitted a letter from the Secretary of War stating that the

joint board of Army and Navy officers had reported that in their opinion North Island was the best location in the country for the establishment of the joint army and navy station, and recommended that the authority of Congress be obtained for immediately taking possession thereof, and that this report had been approved by the heads of both departments.

The House report was submitted by Mr. Caldwell of the Committee on Millitary Affairs on June 26, 1917, and is found in House Reports, vol. 1, 65th Cong., 1st sess., being report No. 88.

On February 9, 1917, the President transmitted to the Senate and House the third preliminary report of the Commission on Navy Yards and Naval Stations dated January 31, 1917. House Doc., vol. 32, pt. 1, 64th Cong. 2d sess.; Doc. 1946, pt. 3. This report deals exclusively with submarine and aviation bases on the coast of southern California. On page 15 thereof this commission says:

> In examining the San Diego Bay region to discover the most suitable site, it was noted that the commission of army officers, in its report above referred to, had described and commented upon the five sites considered by it as the only ones available.

After discussing the other four sites the report says:

> This leaves available for consideration only site No. 1, North Island, which contains about 1,200 acres of level ground, all well above high water, and fronts both the bay and ocean.

> Adjoining this property on the east is a tract of several hundred acres of shallow submerged land known as Spanish Bight, which could be reclaimed if necessary to form an enlargement of North Island.

The conclusion of this Commission, found on page 26 of the report, was that the best location for this aviation base was in southern California on San Diego Bay. As a part of this report the commission submits as Appendix B (page 28), a report of investigation of different sites for aviation bases at San Diego, California, made by Capt. A. A. Cunningham, United States Marine Corps, who reports on North Island as follows:

> (*a*) This site contains 1,200 acres of high land clear of all obstructions, fairly level and for the most part smooth. It is practically ready for occupancy without improvements in the site itself.

This report also contains as Appendix B, pt. 4, p. 33, data and information furnished the Commission by the San Diego Chamber of Commerce, with a map showing the location and boundary lines of each site. As to site No. 1, North Island, it is said—

> *Topographical features.*—A practically level area, contains 1,200 acres. Fronting on both the bay and the ocean, without obstruction other than buildings used in connection with the aviation school. Shore line, sloping beach with easy access to deep water.
>
> *Statement of ownership and title.*—Owned by Mr. John D. Spreckels. The Coronado Beach

> Co. has title under a patent issued by the United States of America.
>
> * * * * *
>
> *Value*—Assessed by the county at $400 per acre. No selling price obtainable.

Part 7 of Appendix B of this report is a map, a plan of San Diego Bay showing North Island. This map was rejected by the court and was marked as plaintiff's exhibit 10 for identification (R. 41), and is filed with the records in this case. This map shows the meander of the shore line, approximately 1200 acres of fast land.

Mr. Caldwell was the member in charge of the bill upon the floor of the House and submitted the committee report. When the bill was returned from the Senate to the House, Mr. Caldwell, on July 24, 1917 (Cong. Rec. 65th Cong., 1st sess., vol. 55, pt. 6, p. 5434), requested unanimous consent for its consideration. Mr. Mann of Illinois, before yielding unanimous consent, made inquiries of the member in charge of the bill. Mr. Caldwell stated:

> The facts are these: This island has a little over a thousand acres in it; the property has been appraised generally at about a thousand dollars an acre.

Looking at the reports of the committees of the House and Senate as an exposition of the legislative intent (*Binns* v. *United States*, 194 U. S. 486, 495), and the public documents upon a consideration of which the bill was reported to the House, as well as the explanatory statements made by the committee

member in charge of the bill (*Binns* v. *United States, supra; United States* v. *Coca Cola Co.*, 241 U. S. 265, 281; *United States* v. *St. Paul, M. & M. Ry. Co.*, 247 U. S. 310, 318; *Duplex Printing Press Co.* v. *Deering*, decided January 3, 1921, not yet reported), it is obvious that Congress, acting upon the information of the Army and Navy Commission, the data furnished by the Chamber of Commerce, and the explanatory remarks of the chairman of the committee, did not contemplate the possession and condemnation of any lands other than the high land, fairly level, and containing about 1200 acres.

IV.

Because the United States was entitled to have the 1232.92 acres of land lying above high water mark valued under proper instructions as to the title to, and character of ownership of, lands under navigable waters fronting thereon, the case should be reversed and remanded.

As above noted, the court instructed the jury that defendant company's ownership extended out beyond ordinary high water mark to the anchorage for ships and included the tide lands, which ownership was derived not from California but from the former Mexican government. And furthermore, that in these tide lands defendant had all the rights of full ownership in their improvement as privately owned tide lands subject only to existing federal regulation of bulkhead and pierhead lines. This erroneous instruction as to title necessarily gave a fictitious value to the high land. It would seem to need no argument

to show that the sole ownership of the company in the tide lands and submerged lands, giving it the exclusive and uncontrolled right to improve and use them in connection with its ownership of the high lands, gave the latter an added value. That the alleged private ownership of the tide lands was a material factor contributing to the value which the jury placed on the uplands is made plain by the evidence admitted by the court, some of it over the exception of the Government. By reference to the record it will be seen that the Government objected to the introduction of evidence as to the uses and adaptability of the tide lands (R. 44), and the court reserved its ruling and it was agreed that the testimony should go in and that the Government had saved the point. R. 45.

The map, Exhibit D, showing the capability and adaptability of the tidelands and highlands for development and the evidence explanatory thereof, was admitted over the objection and exception of the Government. R. 47, 48. Other evidence was admitted, apparently without objection and without exception, expressly directed to prove that the ownership of the tidelands as a unit with the uplands was a material factor in arriving at the value of the uplands.

The jury's appraisal of the upland was predicated (1), upon and controlled by the assumed fact that both tidelands and uplands were united in one ownership, and that this united ownership permitted unhampered development of both free of any restriction, and (2),

upon expert testimony to the effect that the market value of the upland was thereby substantially augmented and enhanced.

In opening its case defendant introduced witness Holmes (R. 44–54) to illustrate by imaginary drawings, called maps (especially Exhibit D), and explanatory testimony, the adaptability of the submerged tidelands for the construction of a great artificial harbor with wharves, basins, embankments and marine terminals, none of which either exist or are proved to be commercially feasible at the present time or in the immediate future.

While examining this witness counsel for the owner said in open court:

> The situation, if your honor please, is peculiar in this case. The tidelands here in point of area, extent, and adaptability are unique, in a class by themselves; perhaps no replica of it anywhere in the State of California. Under those circumstances it can not be said to have a market value in the sense that a 25-foot lot has a market value, and, under those circumstances well-informed persons may be inquired of as to their opinions touching the value of such property. I am now inquiring of this witness his opinion touching the market value of the property, in view of its adaptability for the purposes indicated upon this map, not as to its value when all these improvements have been made and constructed and you have a going concern. Such a value might be fabulous, but its present value, or its value as of the 1st of August, 1917, in view of the fact

> that that intact and unbroken waterfront ownership is presently adaptable to these commercial uses, and was so adaptable in August, 1917.

The witness thereupon stated his opinion that the value of the tidelands (alone) was much more than $3,000,000. While he did not testify at all as to the value of the upland, it is quite obvious that the enormous value attributed by him to the tidelands was because of their connection with the extensive area of adjoining uplands also shown on his maps and because of the statement of counsel (*supra*) as to the intact and unbroken waterfront ownership presently adaptable to the commercial uses pictured on the map and which adaptability is pointed out explicitly by the witness on page 53 of the transcript.

Witness Masten said in part (R. 55):

> It [the property] consisted of an absolute unit, owned by one man, readily converted into blocks and lots for residences, for villa sites, and the water feature of the submerged lands for aquatic sports, swimming pools, yacht harbor, and the like, and it could have been used for hotels and apartment houses. * * * The inner basin, or the basin, the submerged lands, are adaptable for yacht harbors, and the like, and readily lend themselves to the use of boats for people who can afford them. * * *

On page 56 he again referred to the adaptability of tidelands to residential features, such as yacht basins, swimming parks, aquatic parks, etc., and on page 57

spoke of the commercial adaptability of that part of the island adjacent to the submerged lands. He then said:

> The circumstance that a large tract of land like North Island regarded from the point of view of any use, residential or commercial, for which it is adaptable, is in a unitary, single ownership—that it has wholeness of ownership for the purposes of purchase and sale—is, in my judgment, a factor or element of value in respect to the property.

Witness Burnham said (R. 65) that he considered the factor of a unitary and intact ownership an element in the residential adaptability and suitability of that property, and that the ownership of the tide lands was adaptable "as entering into the residential availability of the tract," inasmuch as it insures the residents access to the water and that no industries could be put in front of them; that a beautiful aquatic park could be developed and maintained there, and that a Venetian village could be worked out splendidly, making homes on small islands which could easily be thrown up, and club house, hotel or villa sites would be a possibility. That the tide lands were capable also of commercial use but not in connection with the residential proposition, and that the uplands and tide lands could be developed either as a residential proposition or for commercial purposes, but that one purpose militated against the other.

Witness Barney said (R. 71) that the tide lands would be quite a feature in connection with the

residential section, provided they were given over for the use of the residents of North Island, and were adaptable for use as a pleasure ground, saying "in my judgment as of August 1, 1917, the singleness and intactness of ownership of this entire tract did enter into its value as a whole, because it could be developed along any line for residence purposes * * *."

Witness Spreckels, the actual owner of the property, said (R. 75, 76): "The unity and intactness of ownership, in my judgment, of North Island as a whole, most decidedly enters as a factor in the value of the property." He placed its market value as a whole as between seven and eight million dollars. On cross-examination he emphasized the advantages of his ownership making possible the development of industries upon submerged lands, and calling attention to the lack of such accommodation elsewhere in San Diego harbor. R. 76, 78.

Witness Welles (R. 80) said: "I regard the tide lands as a very great addition to the use of the land. It gives one a water garden, so to speak, in his back yard." This witness estimated $7,300,000 as the market value of the whole property. He further said: "You have freedom of development in this private ownership for water front purposes that you do not possess on the city water front. You have back land there a mile and a half deep that you can run in all sorts of industries, and the average industry on the water front takes in from 15 to 18 hundred feet in depth, as shown on the Pacific coast." R. 84.

Witness Mooser (R. 84, 86) testified to the general adaptability of the land for residential, commercial, industrial and railroad terminal purposes. That it was adaptable commercially principally because of its water front facilities, saying "I know of but very few other pieces of property located on the water front in the State of California where the individual title goes out to the pierhead line. It is easily adaptable to the purpose of a railroad terminal, and its main industrial value comes from the fact that water and rail are brought together. In my judgment, the fair market value of that property, as of the 1st of August, 1917, in view of all the adaptabilities to which it could be put, was $7,000,000. * * * If the entire island were used exclusively residentially, and the water front made use of for an aquatic park, bathing establishments, and establishments of that character, in order to enhance the value of the residential land, I would put the value of the residential land as high as $5,000 an acre."

Under this glowing testimony as to the possibilities of the development of the high lands based upon the exclusive ownership of the tide lands and the development of the tide lands, backed up by unity of ownership with the high lands, and the expressed opinion of experts that this unity of ownership was a very material factor in the valuation of the high land, it is beyond controversy that the high land was given a fictitious value.

It is confidently submitted that the government was entitled to have this high land valued by the

jury under its requested instruction that the State of California is the owner of all land bordering upon the tide waters within the state, and that the private ownership of land bordering thereon could only extend to the ordinary high water mark. *Boston Chamber of Commerce* v. *Boston, supra.*

There is an added assignment of error to the action of the court in admitting in evidence the map—Exhibit D—for the reason that the map did not merely show the uses to which the land could be adapted, but was extended to include all possible future uses under circumstances which did not exist and which in the future may never exist and for the further reason that the map included submerged and other lands adjacent to North Island and forming no part thereof, upon which were to be constructed wharves, warehouses, docks, piers and basins.

There is no specific assignment of error to the admission of the evidence of the witness Holmes and other witnesses, explanatory of this map, but the whole evidence is copied in one bill of exceptions, and it appears (R. 44) that objection was made to this evidence and (R. 45) that the court reserved its ruling and admitted the testimony upon the following understanding:

> The COURT. * * * I will reserve my ruling on the objection made.
>
> Mr. DENIS. That is agreeable to the Government, and this testimony that is about to be offered will not be interrupted by constant objections from the Government.

> The COURT. No need. I think you have saved your point now, and there is no need of any further objection

We think the assignment of error is well taken and that the map and opinion of witness Holmes of the high value of this property are not evidence tending to show the compensation to which the owner is entitled, "by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future." *Boom Co.* v. *Patterson*, 98 U. S. 403, 408; *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 77. In *Chicago, Burlington &c R. Co.* v. *Chicago*, 166 U. S. 226, 250, the court again states the general rule as laid down in *Boom Co.* v. *Patterson* that compensation is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business and wants of the community, or such as may be reasonably expected in the immediate future, and then adds: "It is well settled that 'mere possible or imaginary uses, or the speculative schemes of its proprietor, are to be excluded,'" citing cases.

The opinions of this witness and of the other witnesses in the case, of the high value of these lands, were avowedly and obviously formed by mere visions and predicted possibilities of potential improvements which involved the expenditure of large capital and the inevitable passing of many years before consummation, and the map introduced in evidence would do credit as a part of the prospectus of an enthusiastic vendor of lots in a wild-cat-oil-boom town.

There is no evidence in the case of existing wants of the city of San Diego or the community surrounding it, or such as might be reasonably expected in the near future, and the map and testimony explanatory thereof show a purely speculative value of the property and are no evidence of its present value. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes, that it is of course difficult to lay down any hard and fast rule, but it is respectfully submitted that the Government of the United States should not be required in condemning property for public uses to submit the value of such property to a jury upon evidence having no regard to the existing reasonably expected wants of the community, but founded only upon the flamboyant optimism of local real estate experts as to the possibilities of the development of the property at some distant time, and who did not hesitate to include in the valuation of this land the God-given climate of California.

CONCLUSION.

For the errors apparent on the record the judgment of the District Court should be reversed and the case remanded for further trial.

Respectfully submitted.

LESLIE C. GARNETT,
Assistant Attorney General.
CHARLES S. LAWRENCE,
Attorney.

FEBRUARY, 1921.

APPENDIX.

Decree of the 18th August, 1824, Respecting Colonization.

The sovereign general constituent Congress of the United Mexican States has been pleased to decree—

1st. The Mexican nation promises to those foreigners who may come to establish themselves in its territory security in their persons and property, provided they subject themselves to the laws of the country.

2d. The objects of this law are those national lands which are neither private property nor belong to any corporation or pueblo, and can therefore be colonized.

3d. To this end the Congress of the States will form, as soon as possible, the laws and regulations of colonization of their respective demarcation, with entire conformity to the constitutive act, the general constitution, and the rules established in this law.

4th. Those territories comprised within twenty leagues of the boundaries of any foreign nation, or within ten leagues of the seacoast, can not be colonized without the previous approval of the supreme general executive power.

5th. If, for the defence or security of the nation, the federal government should find it expedient to make use of any portion of these lands for the purpose of constructing warehouses, arsenals, or other public edifices, it may do so, with the approbation of the general Congress, or during its recess with that of the government council.

6th. Before the expiration of four years after the publication of this law, no tax or duty (direcho) shall be imposed on the entry of the persons of foreigners who come to establish themselves for the first time in the nation.

7th. Previous to the year 1840 the general Congress can not prohibit the entry of foreigners to colonize, except compelled to do so with respect to the individuals of some nation by powerful reasons.

8th. The government, without prejudicing the object of this law, will take the precautionary measures which it may consider necessary for the security of the federation, with respect to the foreigners who may come to colonize. In the distribution of lands, Mexican citizens are to be attended to in preference; and no distinction shall be made amongst these, except such only as is due to private merit and services rendered the country, or inequality of circumstances, residence in the place to which the lands distributed belong.

10th. Military persons who are entitled to lands by the promise made on the 27th of March, 1821, shall be attended to in the States, on producing the diplomas granted to them to that effect by the supreme executive power.

11th. If by the decrees of capitulation, according to the probabilities of life, the supreme executive should see fit to alienate any portion of land in favor of any military or civil officers of the federation, it may so dispose of the vacant lands of the territories.

12th. No one person shall be allowed to obtain the ownership of more than one league square, of five

thousand varas (5,000 v.), of irrigable land (de regadio), four superficial ones of land dependent on the seasons (de temporal), and six superficial ones for the purpose of rearing cattle (de abreradiso).

13th. The new colonists can not transfer their possessions in mortmain (manos muertas).

14th. This law guarantees the contracts which the grantees (empressarios) may make with the families which they may bring out at their expense; provided they are not contrary to the laws.

15th. No one who, by virtue of this law, shall acquire the ownership of lands, shall retain them if he shall reside out of the territory of the republic.

16th. The Government in conformity with the principles established in this law, will proceed to the colonization of the territories of the republic.

General Rules and Regulations for the Colonization of Territories of the Republic.—Mexico, November 21, 1828.

It being stipulated in the 15th article of the general law of colonization of the 18th of August, 1824, that the government, in conformity with the principles established in said law, shall proceed to the colonization of the territories of the republic; and it being very desirable, in order to give to said article the most punctual and exact fulfillment, to dictate some general rules for facilitating its execution in such cases as may occur, his excellency has seen fit to determine on the following articles:

1st. The governors (gefes politicos) of the territories are authorized (in compliance with the law of the general Congress of the 18th of August, 1824, and under the conditions hereafter specified) to grant

vacant lands in their respective territories to such contractors (empresarios), families, or private persons, whether Mexicans or foreigners, who may ask for them, for the purpose of cultivating and inhabiting them.

2d. Every person soliciting lands, whether he be an empresario, head of a family, or private person, shall address to the governor of the respective territory a petition, expressing his name, country, profession, the number, description, religion, and other circumstances of the families or persons with whom he wishes to colonize, describing as distinctly as possible, by means of a map, the land asked for.

3d. The governor shall proceed immediately to obtain the necessary information whether the petition embraces the requisite conditions required by said law of the 18th of August, both as regards the land and the candidate, in order that the petitioner may at once be attended to; or if it be preferred, the respective municipal authority may be consulted, whether there be any objection to making the grant or not.

4th. This being done, the governor shall accede or not to such petition, in exact conformity to the laws on the subject, and especially to the beforementioned one of the 18th of August, 1824.

5th. The grants made to families or private persons shall not be held to be definitely valid without the previous consent of the territorial deputation, to which end the respective documents (espedientes) shall be forwarded to it.

6th. When the governor shall not obtain the approbation of the territorial deputation, he shall report to the supreme government, forwarding the necessary documents for its decision.

7th. The grants made to empresarios for them to colonize with many families shall not be held to be definitely valid until the approval of the supreme government be obtained; to which the necessary documents must be forwarded, along with the report of the territorial deputation.

8th. The definitive grant asked for being made, a document signed by the governor shall be given, to serve as a title to the party interested, wherein it must be stated that said grant is made in exact conformity with the provisions of the laws in virtue whereof possession shall be given.

9th. The necessary record shall be kept in a book destined for the purpose, of all the petitions presented, and grants made, with the maps of the lands granted, and the circumstantial report shall be forwarded quarterly to the supreme government.

10th. No capitulization shall be admitted for a new town except the capitulizator bind himself to present, as colonists, twelve families at least.

11th. The governor shall designate to the new colonists a proportionate time within which he shall be bound to cultivate or occupy the land on the terms and with the number of persons or families which he may have capitulized for, it being understood that if he does not comply, the grant of the land shall remain void; nevertheless, the governor may revalidate it in proportion to the part which the party may have fulfilled.

12th. Every new colonist, after having cultivated or occupied the land agreeable to his capitulization, will take care to prove the same before the municipal authority, in order that, the necessary record being made, he may consolidate and secure his right of ownership, so that he may dispose freely thereof.

13th. The reunion of many families into one town shall follow, in its formation, interior government, and policy, the rules established by the existing laws for the other towns of the republic, special care being taken that the new ones are built with all possible regularity.

14th. The minimum of irrigable land to be given to one person for colonization shall be 200 varas square; the minimum of land called de temporal shall be 800 varas square, and the minimum for breeding cattle (de obsevadeso) shall be 1,200 varas square.

15th. The land given for a house-lot shall be 100 varas.

16th. The spaces which may remain between the colonized lands may be distributed among the adjoining proprietors who shall have cultivated theirs with the most application and have not received the whole extent of land allowed by the law, or to the children of said proprietors, who may ask for them to combine the possessions of their families; but on this subject particular attention must be paid to the morality and industries of the parties.

17th. In those territories where there are missions the land occupied by them can not be colonized at present, nor until it be determined whether they are to be considered as the property of the establishments of the neophytes, catechumens, and Mexican colonists.

Extracts from page 3 to top of page 10, inclusive, of the field notes of the official survey of the peninsula or island of San Diego, commenced June 29, 1867, and completed July —, 1867:

Thence N. 37 W. 11.00 to station No. 19 and from this station in order to fix the western boundary of the tract at the anchorage for ships, named in the

decree of confirmation, I project a line due west 7.00 chains to the edge of the deep water or channel shown by the map of the U. S. Coast Survey as such anchorage and from thence I project another line along the eastern edge of the deep water or anchorage for ships shown by the map of the U. S. Coast Survey as aforesaid due north 81.00 chains.

And running the traverse line of high water mark around the bay to the inlet or "estero" from station No. 19, as follows:

(Traverse for obtaining west boundary.)

N. 14½ W. 13.00, to Station No. 20; thence N. 3¼ W. 8.00, to Station No. 21, from which the point of ballast point before taken bears S. 21¾ W.; thence N. 75 E. 50, to Station No. 22; thence S. 22 E. 9.00, to Station No. 23; thence S. 82 E., 4.00, to Station No. 24; thence N. 84½ E. 2.00, to Station No. 25, and deposit a tin oil can 12 x 6 in. on edge of salt marsh; thence S. 77 E. 5.00, to Station No. 26; thence N. 72 E. 3.60, to Station No. 27; thence S. 8 E. 5.00, to Station No. 28; thence S. 26¾ E. 5.00, to Station No. 29, salt grass 1 chain wide; thence S. 62 E. 5.10, to Station No. 30, an old pile of rocks; thence S. 79 E. 3.00, to a trail over which are rolled barrels of water from a hhd. set in a spring of fresh water, dist. some 5 chns. S. 10 E. 3.50, to a point from which along the shore the salt marsh is about 60 lks. wide; 8.00, to Station No. 31, salt marsh; thence S. 69 E. 2.00, to Station No. 32; thence N. 88 E. 7.50, to Station No. 33; thence N. 82 E. 7.50, to station No. 34; thence N. 72 E. 7.00, to station No. 35; thence N. 63 E. 7.00, to Station No. 36 or point of inlet; thence S. 88½ W. 25.00, to Station No. 37; thence N. 86½ W. 5.00, to Station No. 38; thence S. 61¾ W. 1.00, to Station No. 39; thence N. 48 W. 2.00, to station No.

40; thence N. 6½ W. 3.00, to Station No. 41; thence N. 9¼ E. 1.00, across slough 12 lks. wide from NE. 13.00, to Station No. 42, in salt marsh 150 lks. from water; thence N. 72 W. 10.00, to Station No. 43, in salt marsh some 150 lks. from water; thence S. 63 W. 8.00, to Station No. 44, in marsh some 2 chns. to water; thence N. 43¾ W. 2.00, to Station No. 45, from which a buoy in the harbor bears S. 89½ W. and another buoy bears N. 54¼ W. marked Z; thence along the beach at high-water mark, N. 15½ E. 10.00, to Station No. 46, from which the tide gauge at the Plaza bears N. 42¾ W.; thence N. 22 E. 7.00, to Station No. 47, from which one of the buoys before taken bears S. 71½ W. and the other buoy 89¾ W.; thence N. 29¾ E. 8.00, to commencement of bluff of high land some 6 feet high and along the base of same at high-water mark 17.00, to Station No. 48; thence N. 34½ E. 8.00, to Station No. 49, a 24-lb. cannon ball; thence N. 38½ E. 20.00, to Station No. 50, from which the tide gauge before taken bears N. 81¾ W.; thence N. 49¼ E. 10.00, to Station No. 51; thence N. 54½ E. 17.00, to Station No. 52; thence N. 63 E. 13.00, to Station No. 53; thence N. 63½ E. 30.00, to Station No. 54; thence N. 61 E. 10.00, to Station No. 55; thence N. 52 E. 28.00, to Station No. 56; thence N. 68 E. 7.00, to Station No. 57; thence N. 84 E. 10.00, to Station No. 58, and from this station I project a line due west 93.00 chains to the edge of the deep water or anchorage for ships as shown by the aforesaid map of the U. S. Coast Survey and by tabling up the traverse of the shore line from Station No. 19 to Station No. 58, and the aforesaid projected lines of the western boundary by aid of the map of the U. S. Coast Survey in ascertaining the true anchorage for ships, I find the line from the projected

line of 93.00 chains and of the one of 81.00 chains north from the end of the 93.00 chains to be S. W. — chains.

Therefore from Station No. 19 the courses and distances of the true boundary are as follows:

End of traverse line; thence west 7.00, to the deep water or anchorage for ships; thence north, along the E. edge of the channel or deep water constituting the anchorage for ships as shown by the maps of the U. S. Coast Survey, 81.00, to curve of line of deep water to the eastward; thence N. 48¾ E., along same, 83.00, to station; thence east 93.00, to Station No. 58 of the shore traverse before mentioned, from which station the quartermaster's storehouse (sometimes used as barracks) at New San Diego bears S. 84½ E. from this store the meander corner of fourth standard—south range 3 west of San Bernardino Meridian, situated 17.60 chs. west of cor. to secs. 2 and 3; bears N. 11½ W. distant 100 chains and 36 links.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, February 19, 1921.

DEAR MR. ATTORNEY GENERAL: In compliance with your informal request for a statement with reference to certain features appearing of record in the survey of the Peninsula or Island of San Diego, California, the following is submitted as the result of a consideration of that part of the record relating to the location by the surveyor of the anchorage ground referred to as adjacent to the upland included in said claim:

From a study of the field notes of the survey of the Peninsula or Island of San Diego, executed by Henry

Hancock, Deputy Surveyor, under his instructions of May 20, 1867, together with a computation of the results of the traverse line between Stations 19 and 58, it is concluded that the deputy had before him a Coast Survey Chart, on which were delineated certain indications of the location of an anchorage for ships, the limits of which he wished to determine and record in his field notes. For this purpose, he evidently laid down certain courses and distances on the chart, such as that from the corresponding point of his Station 19, whence he projected on paper a line due west 7.00 chs.: thence another line due north 81.00 chs.: here he stopped projecting, and traversed on shore a series of lines from Station 19 to Station 58; from this last station on shore, he, apparently, reverted to the corresponding point on his chart and projected thereon a line due west 93 chs., and from his traverse on shore found the elements necessary for the computation of the line connecting the west end of the 93 chs. projected line to the north end of his 81 chs. projected line; a computation of these elements indicates that this line should be S. 50° 37′ W., 76.41 chs. In the compilation of the courses and distances on page 9 of the deputy's field notes, this line is given coming up from the south as N. $48\frac{3}{4}$° E. 83.00 chs., when according to the above conclusions it should have been given as N. 50° 37′ E., 76.41 chs.

The consequence is that there is a failure to close represented by a line N. 28° 07′ E., 7.09 chs.

Very respectfully,

CLAY TALLMAN,
Commissioner.

The honorable the ATTORNEY GENERAL,
Department of Justice.

Translation

Nº188.
Frederick Billings et al. Assignee.
Isla de San Diego (Island of San Diego)
Espediente (Plaintiff or Petitioner)
Filed in office Sept. 22d, 1852.
Geo. Fisher.
sy.

Diseno de la Ysla o Peninsula
(Map of the Island or Peninsula)
que pretende al ciudadano Pedro C. Carrillo
(which belongs to citizen Pedro C. Carrillo).

Inscriptions on map

Rumbo Norte – North course (compass bearing)
Pt. de Estero – Inlet Point.
Pt. de los Muertos – Dead Men's Point.
San Diego – San Diego.
Escala de Millas – Scale of Miles.

OVERSIZE PAGE
SEE NEXT FRAME

Diseño de la Isla ó Peninsula
que pretende el Ciudadano Pedro C. Carrillo

N.º 188

Francis Burroughs el Ac. Agujar
Isla de San Diego

Expediente

Filed in Office Sept 22d 1852
Chas. Ricker